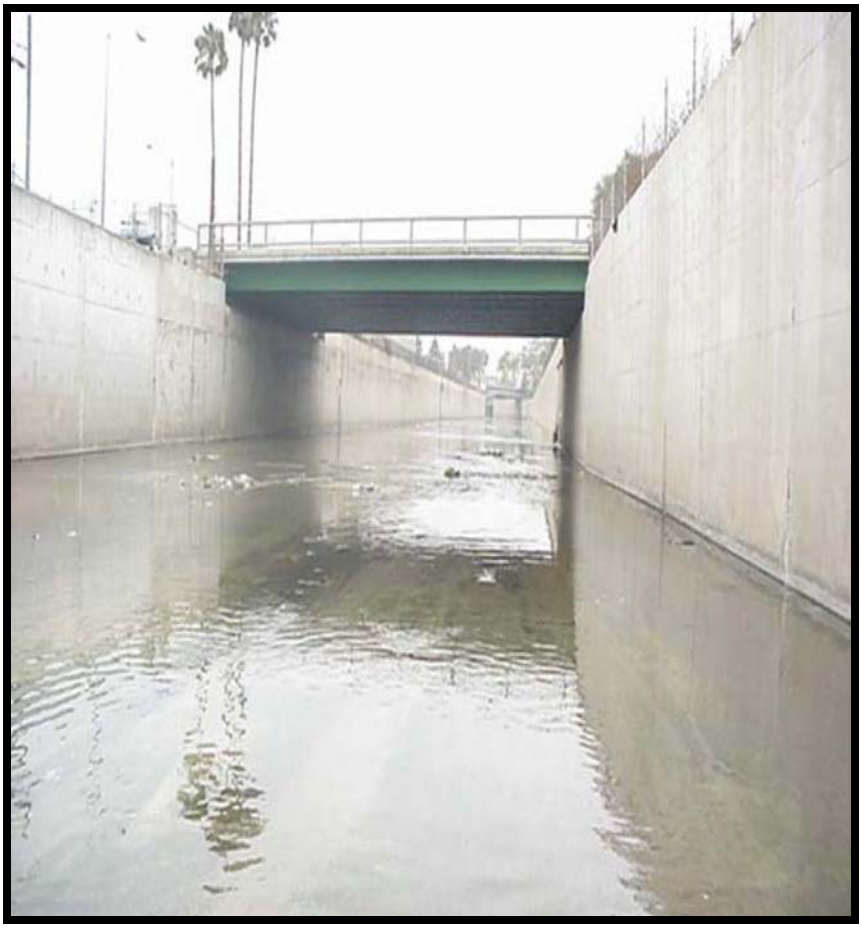
CONGRESSIONAL STATEMENT OF MR. KEN FARFSING: "THE CLEAN WATER ACT, A LOCAL GOVERNMENT PERSPECTIVE"

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Subcommittee on Water Resources and Environment
Hearing on the Need to Update Water Quality Standards to Improve Clean Water Act Programs

Thursday, June 19, 2003
10:00 am
Committee Room 2167 Rayburn Building



This concrete box culvert in the City of Los Angeles is being regulated as Waters of the United States. Its swimming designated use was upheld on Thursday June 5, 2003.

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I.
SUMMARY STATEMENT

On behalf of the City of Signal Hill, California, and the many other member cities of the Coalition for Practical Regulation ("CPR"), I am respectfully submitting this Congressional Statement for your consideration. As described in more detail below, I and the CPR cities believe that State of California water quality officials, particularly in the Southern California region, under pressure from the United States Environmental Protection Agency ("U.S. EPA"), are regulating urban runoff and stormwater in a manner inconsistent with the Clean Water Act ("CWA"). In short, these agencies are treating public storm drains as "navigable waters of the United States" and designating them for fishable and swimmable beneficial uses, resulting in an impractical, inflexible and unworkable approach to regulation of municipal separate storm sewer systems, commonly referred to as MS4s. The resulting problems are systemic, manifesting in all CWA regulatory programs, from basin planning and the setting of water quality standards, to the CWA's permitting program (*i.e.*, NPDES), to the Total Maximum Daily Load ("TMDL") program. While water quality is very important to us, the radical extension of regulatory jurisdiction being aggressively pursued in California is the path to neither improved water quality nor productive collaboration among stakeholders in pursuit of that goal. Rather, it has polarized the issue, stalling water quality progress, and underscoring the need for congressional action and leadership.

II.

DESCRIPTION OF INTEREST

I have served as a city planner and city manager for the last 24 years in the Southern California area and have a master's degree in Urban Planning from the University of Southern California. I am currently serving as City Manager for the City of Signal Hill, California. In addition to my duties as City Manager, I am the Senior Coordinator for CPR and am actively involved in stormwater regulation. CPR is a broad coalition of forty-six Southern California cities formed to participate in the formulation and interpretation of stormwater regulations. CPR's goal is ensure that stormwater regulations for the Southern California region make common sense, taking into consideration the interests of the regulators, the regulated community and the public welfare.

The City of Signal Hill and other CPR members have a significant interest in the ongoing debate regarding potential amendments to the CWA. The member cities are all permittees under a permit governing the public storm drains in the Los Angeles region. That permit is issued by the California Regional Water Quality Control Board, Los Angeles Region (the "L.A. Regional Board") and reviewed by U.S. EPA. It is a National Pollutant Discharge Elimination System ("NPDES") permit under the CWA, commonly referred to as an MS4 permit. CPR currently is a plaintiff in a lawsuit challenging the permit.

CPR also is involved in basin planning activities by the L.A. Regional Board. CPR has learned that, in proceedings monitored closely by U.S. EPA, the Regional Board over the years has extended the application of water quality standards from true water bodies, to which such standards appropriately apply, to points far inland, within the urban core where such standards are being inappropriately applied to box culverts with vertical concrete walls without actual beneficial uses, and other components of the public storm drain system.

Through its TMDL program, the L.A. Regional Board requires strict compliance with water quality standards. When these standards are applied to a collection system like the public storm drain, the results are draconian – beyond the capacity of local government to finance.

Thus, CPR also has become involved in the TMDL program, with a lawsuit pending against the Regional Board regarding a TMDL with a zero allocation for concrete-lined channels running through urban Los Angeles. The Regional Board issued its zero-allocation TMDL only after U.S. EPA had pressured it by issuing its own plan, which would have resulted in the loss of local control.

A common thread running through all areas in which we observe agency excess is the assumption by the agencies that waters of the United States have no upstream boundary, and can be pushed as far inland and upland as the agencies arbitrarily decide, including into the public storm drain. Thus, CPR believes it has a substantial interest in congressional consideration of legislation to remedy this over reaching by the agencies.

II.

FEDERAL ROLE IN CALIFORNIA WATER QUALITY MATTERS

U.S. EPA Region IX oversees the implementation of the federal CWA in the State of California. U.S. EPA has "delegated" CWA authority to the State of California but retains its own authority to act here and often does. The State of California amended its Water Code in 1972 in part to "avoid direct regulation by the federal government" under the CWA.[1] However, that legislative purpose has never been fully realized. U.S. EPA operates with a heavy hand in the State, as we often hear from state water quality officials that their "hands are tied" by Region IX directives.

For example, while the State has authority to promulgate water quality standards, U.S. EPA intervened in 2000 to prescribe state-wide standards for toxics.[2] Implementation of U.S. EPA's toxics standards in the State of California has been a major problem, as the standards are overly stringent, regulating some substances into the parts per quadrillion range, and in many cases at levels with no real-world adverse effects.

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1 Cal. Water Code §13320(c), Stats. 1972, c. 1256, p. 2485, §1, eff. Dec. 19, 1972.

2 *See* California Toxics Rule, 40 C.F.R. part 130, 65 Federal Register 31683 (May 18, 2000).

U.S. EPA also has interfered with the State's administration of the TMDL program and, in 1999, entered into a Consent Decree with environmental groups. *See* Exhibit A. The Consent Decree was negotiated without meaningful municipal input, even though federal regulation requires incorporation of TMDL allocations into the MS4 permits issued to local government.[3] Dictating the terms of the TMDL program for the Los Angeles area is resulting in poorly conceived TMDLs, spurring controversy and litigation.

Finally, U.S. EPA has delegated the NPDES permit-writing program to the State, but retains authority to object to those permits. U.S. EPA has been very involved in the provisions of the MS4 permits issued to California cities, requiring Receiving Water Limitations language that has nullified the practicability standard enacted by Congress in 1987 specifically for cities.

III.

SPECIFIC EXAMPLES OF REGULATORY EXCESS

CPR has become aware of various instances throughout the State where water quality officials have taken the interpretation of the CWA to extremes. This section provides examples to illustrate how these officials are improperly asserting jurisdiction under the CWA, resulting in invasive regulation that is doing little to improve the water quality of true open waters.

A. The Automatic Extrapolation Of Beneficial Uses For Real Open Waters To Upstream Drainages, Regardless Of Their Actual Uses

The upland extension of waters of the United States creates bizarre results when coupled with the so-called "Tributary Rule," contained in many of the U.S. EPA-approved Basin Plans for California.[4] Under the Tributary Rule, the agencies improperly assume that storm drains and other upstream drainages automatically have the same water quality standards (beneficial uses and criteria to protect those uses) as the downstream waters to which they drain. For example, the Tributary Rule in the L.A. Basin Plan states as follows:

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[3] 40 C.F.R. § 122.44.

[4] California is split into nine regions, each with a Regional Board, and each with an EPA-approved Basin Plan containing local water quality standards for that region.

> "Those waters not specifically listed (generally smaller tributaries) are designated with the same beneficial uses as the streams, lakes, or reservoirs to which they are tributary. This is commonly referred to as the 'tributary rule.'"

The Tributary Rule is being used to regulate certain municipalities as if they are discharging to waters that constitute a source of public water supplies, or a place in which to swim, or a habitat for fisheries, when the reality known to the agencies is demonstrably to the contrary.

For example, on the basis of the Tributary Rule, Vacaville, a small city in the Central Valley of California, is being held to a permit for its wastewater plant predicated on the assumption that the beneficial uses for public water supplies (MUN) and cold water fisheries (COLD) are relevant to the waters to which it discharges (a hydrologically modified creek dominated by wastewater effluent and agricultural tailwater) when, in fact, the "Central Valley Regional Board staff considered the uses and concluded that they did not exist and were highly unlikely to exist in the future. These conclusions were supported by uncontradicted evidence in the record."[5] While the wastewater plant is located many miles upstream of the Sacramento-San Joaquin River Delta, on the basis of the Tributary Rule the Central Valley Regional Board applied the Delta's beneficial uses to the plant's discharges.[6]

Vacaville appealed the permit to the California State Water Resources Control Board, to which the Regional Boards report. The State Board acknowledged that the designated uses do not exist in the real world, but concluded that it was powerless to act without formal regulatory action, in large part because of U.S. EPA's interpretation of the Tributary Rule.[7] Vacaville has

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[5] Order WQO 2002-0015, State Water Board, pages 29-30 (Oct. 3, 2002). Available online at http://www.swrcb.ca.gov/resdec/wqorders/2002/wqolog.html.

[6] *Id.* at page 4.

[7] *Id.* at pages 9-10.

now filed a lawsuit in California Superior Court challenging the State Board's decision, including its interpretation and application of the Tributary Rule.

Of great frustration to the City of Vacaville is the fact that in the mid-1990s the Central Valley Regional Board tried vehemently to modify the Tributary Rule in an attempt to avoid such outlandish results and "remove a known falsehood from the Basin Plan."[8] As noted then by the Central Valley Regional Board, "[i]n the real world of the Central Valley's watersheds, exceptions to the tributary footnote [*i.e.*, rule] abound," the "fundamental premise" of which is "false."[9]

However, years later in 2000, U.S. EPA disapproved of the Central Valley Regional Board's attempt to modify the Tributary Rule.[10] The Central Valley Regional Board objected to U.S. EPA's intervention, explaining that the Tributary Rule can lead to "inconceivable" results that "just do not make sense."[11] As the Central Valley Regional Board commented in 1994: "USEPA staff have invoked the tributary footnote as the appropriate principle governing the selection of beneficial uses, even in the face of conflicting facts. . . . USEPA says there is no need for fact findings, the tributary footnote tells us all we need to know."[12] Under pressure from U.S. EPA, the Central Valley Regional Board and the State Board are now holding Vacaville hostage to the other-worldly consequences of the Tributary Rule.

Similarly, in 2001, the Santa Ana Regional Board (based on the Tributary Rule) applied designated beneficial uses for Newport Bay in Orange County to a vertical-walled, fenced-off concrete box culvert draining downtown Santa Ana. Thus, found the Regional Board, drinking

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8 *Staff Report Re: Amendment of the Water Quality Control Plan for Sacramento River Basin, Sacramento-San Joaquin Delta Basin, and the San Joaquin River Basin*, Central Valley Regional Board (Oct. 11, 1994), Exhibit B.

9 *Id.*

10 *Letter from Alexis Strauss to Edward C. Anton Re: Disapproval of Certain Portions of Central Valley Basin Plan*, May 26, 2000, Exhibit C.

11 *Letter From Jerrold A. Burns To Kathy Goforth Re: Response To US EPA Actions On Central Valley Basin Plan Amendments*, August 31, 2000, Exhibit D.

12 *See Staff Report*, footnote 8.

water and swimming standards must be met in the culvert, referred to as the Delhi Channel. A photograph of the culvert is attached at Exhibit E. Since the standards were not met within the Channel, the Regional Board recommended that the culvert be slated for a TMDL under the CWA Section 303(d) program. Fortunately, in February 2003, the State Board voted to reject the Regional Board's recommendation regarding the Delhi Channel. However, the Delhi Channel remains a powerful example of the tendency in California to improperly assert jurisdiction and standards to inland storm collection systems.

B. <u>Vertical-Walled Box Culvert Being Regulated As Waters Of The United States That Is Swimmable</u>

The EPA-approved water quality standards for the Los Angeles area designate as waters of the United States a vertical-walled, concrete-lined box culvert that runs from downtown Los Angeles to Duquesne Avenue in Culver City, approximately three miles long. Once an unfortunate precedent like this one is established, U.S. EPA will not assist the undoing of the overreach but, rather, requires the state agency to undertake a "structured scientific process" called a Use Attainability Analysis ("UAA") to even remove uses that clearly do not apply. This particular box culvert has a body-contact recreation designated uses called "REC-1" which includes swimming and is defined in the Basin Plan as follows:

> "Uses of water for recreational activities involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, swimming, wading, water-skiing, skin and scuba diving, surfing, white water activities, fishing, or use of natural hot springs."

The difficulty of making any headway in correcting the wrong through the UAA process specified in U.S. EPA's regulation[13] was on display in Los Angeles earlier this month. On June 5, the L.A. Regional Board voted to maintain REC-1 as a designated beneficial use for the

[13] 40 C.F.R. §131.10.

culvert. Regional Board staff had conducted a UAA and recommended removal of the swimming designation because there is no access to the culvert and because of the extreme danger in entering the culvert when it does contain flood water. Notwithstanding this common sense recommendation, the board rejected the staff recommendation and upheld the swimming designation, demonstrating the difficulty of the UAA process.

The culvert is euphemistically called the "Ballona Creek" by the Regional Board. The staff UAA addressing the swimming standard is attached hereto as Exhibit F.[14] The cover page of this statement and Figure 5 at page 21 of the UAA contain photographs of the culvert. Imagine being stuck in the culvert with a flood wave bearing down on you. The CWA does not require treating this culvert as "waters of the U.S." to which swimming and consequently bacterial standards apply. In fact, maintaining the swimming usage is irresponsible as it invites dangerous, life-threatening activity.

C. Entire Public Storm Drain System Declared "Waters of the United States"

The San Diego Regional Board in 2001 issued an MS4 permit for the public storm drains in that region. The definition of waters of the United States contained in that permit states that: "a Municipal Separate Storm Sewer System (MS4) is always considered a Waters of the United States."[15] The agency defines MS4s to include all "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or storm drains. . . ."[16] Thus, under this agency's view, the entire municipal storm drain starting at the curb and gutter should be regulated under the CWA as if it is "navigable waters of the United States."[17]

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[14] *Draft Use Attainability Analysis For Rec-1 Beneficial Uses Of Ballona Creek And Water Quality Objectives Change*, California Regional Water Quality Control Board (April 4, 2003).

[15] Order No. 2001-01, page D-8, San Diego Regional Board (Feb. 21, 2001), Exhibit G.

[16] *Id.* page D-4.

[17] *Id.*

The ramifications of this approach are deeply troubling. Point source discharges to waters of the United States require NPDES permits. Imagine the number of "point sources" that "discharge" to our urban and suburban streets. Are driveways and sidewalks point sources requiring a permit under this scheme? To say that the agency's definition brings the CWA to our front door is not hyperbole.

This definition was upheld by a California Superior Court in February of this year. Environmental groups are heralding the San Diego permit as a good vehicle for the nation to follow. An environmental attorney for San Diego BayKeeper was paraphrased in the San Diego Tribune as proclaiming that the decision "clears the way for San Diego's storm-water permit to become a national model."[18]

D. Agencies Specifying Upland Best Management Practices ("BMPs") And Invading The Land Use Authorities Of Local Government

Another consequence of the inland extension of CWA jurisdiction being pursued by the agencies in California is that it is leading them to micro-manage how local government fashions management practices to protect downstream receiving waters. For example, the San Diego Regional Board expresses a preference in its NPDES permit as to where BMPs are to be placed, requiring them as close to where the raindrop hits the ground as possible: "Use small collection strategies located at, or as close as possible to, the source (*i.e.*, the point where water initially meets the ground) . . . ."[19]

This approach is antithetical to the regional solution approach, as acknowledged by the Regional Board. The Regional Board is more interested in changing psychology and requiring site design changes, than promoting regional solutions that may "take care of everything downstream."[20]

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[18] San Diego Union Tribune, Page B-1 (Feb. 14, 2003), Exhibit H.

[19] *See* page 14 of San Diego permit, footnote 15, Exhibit G.

[20] Responses to Comments on San Diego Municipal Stormwater Permit Order No. 2001-01, San Diego Regional Board, page 38 (Nov. 6, 2001). Available online at:

The San Diego Regional Board also is demanding BMPs for a plethora of urban and suburban land uses – a further consequence of its upland and landward march. The agency is requiring mandatory BMPs for residential activities such as home gardening, automobile washing and parking.[21] The San Diego permit requires cities to prohibit their residents from common activities, including hosing off driveways and patios, and washing their cars unless you can catch the rinse water before it enters the catch basin.[22] While these activities may be non-point sources of runoff subject to the CWA Section 319 program, they certainly should not be regulated under a NPDES municipal stormwater permit. *See* 33 U.S.C. § 1329 ("non-point source management programs").

These intrusions through the federal NPDES program are affecting quality of life in Southern California. For example, inspectors enforcing federal law ordered a downtown L.A. landlord who has helped to rehabilitate an area near skid row to stop washing his sidewalk.[23] According to the L.A. Times, the sidewalk cleaner was admonished to "[d]rop that hose." The owner said he would "cease and desist from maintaining my properties as any human being would have a right to expect," if the city agreed to clean the sidewalks of the previous nights accumulation of "urine, human waste, vomit, alcohol, cardboard, clothing, hypodermic needles, crack pipes and bullet casings." Recognizing the landlord's "Catch-22 situation," city officials stressed that their hands were tied by federal law requirements.

IV.

CPR ACTIVITIES

CPR understands its responsibility to engage productively on CWA issues. While the actions of U.S. EPA and the Regional Boards have been such that CPR has been forced to

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http://www.swrcb.ca.gov/rwqcb9/programs/stormwater/sd%20permit/Compiled%20Final%20Response%20to%20Comments.pdf.

[21] *See* page 33 of San Diego Permit, footnote 15, Exhibit G.

[22] *Id.* at §§ D.1.b.5, D.1.b.8.

[23] *See* L.A. Times article, October 9, 2002, Exhibit I.

participate in litigation to protect local government and the 2,059,000 residents who live in the CPR member cities, CPR is very interested in solutions that promote real improvement in water quality. CPR has sponsored several studies that are intended to help the agencies work their way towards meaningful reform that will facilitate water quality gains. So that you might better appreciate some of the specific concerns that are expressed in the next section, I thought it might be useful in this section to summarize these studies for you.

A. Constructed Wetlands/Regional Natural Treatment

The practical result of labeling an MS4 system "navigable waters of the United States" is that the CWA's water quality standards are applied *directly* to municipal storm drains. If all the water in the public storm drain system must meet water quality standards, then the water will need to be treated *before* it enters the collection system. One need only appreciate the fact that water enters the public storm drain at untold locations in a vast urban metropolis like Los Angeles to understand the impractical nature of this "micro" approach, and the danger of making it an enforceable norm by mandating it through the NPDES program, as the agencies are doing. Because urban runoff comes from so many different and diverse sources, it is not possible to effectively and efficiently regulate them on an individual basis.

The alternative being promoted by CPR and others is to construct natural treatment wetlands at locations *after* runoff enters the public storm drain but *before* it enters true open and "navigable" waters. CPR sponsored a feasibility study on the use of constructed wetlands in the L.A. area.[24] In the study, Brown & Caldwell, a nationally recognized environmental consulting firm, concluded that regional facilities such as constructed wetlands offer several advantages over site-specific controls. Constructed wetlands can support comprehensive watershed planning efforts in which conditions throughout the watershed are addressed.[25] Constructed wetlands

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[24] *See* Brown & Caldwell, *Regional Solutions for Treating Stormwater In Los Angeles County: A Macrofeasibility Study*, April 2003, Exhibit J.

[25] *Id.*

offer holistic "macro" watershed solutions rather than site-by-site "micro" solutions.[26] Because of this macro-approach, through "economies of scale" constructed wetlands can offer water quality benefits more quickly and cost-effectively than on-site solutions.[27] In addition to the efficient management of stormwater discharges, constructed wetlands can provide the community multiple-use areas, such as green spaces, walking, biking and jogging areas, and ball fields.[28] There are numerous reasons why regional facilities such as constructed wetlands are an attractive and efficient way to manage municipal stormwater.

B. Economic Consequences Of Current Regulations

The water quality standards for California contain no tolerance for any exceedances in the public storm drains, even where downstream open waters will not be adversely affected by such exceedances. The agencies have offered no alternative to satisfying the logical consequences of these standards other than vast collection and treatment plants for urban runoff. The agencies' TMDLs and other planning documents are starting to call for such treatment. CPR and others sponsored a study to examine the costs of capturing and treating stormwater at stormwater treatment plants.

The study was carried out by engineering experts at the University of Southern California School of Engineering and analyzed the stormwater regulations in the Los Angeles area, taking them at "face value," and estimating the economic consequences of compliance. In November, 2002, the study, which is entitled, *An Economic Impact Evaluation of Proposed Stormwater Treatment for Los Angeles County*, was completed.[29] The following is the "executive summary" of the study's findings, which are quite alarming:

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Gordon, et al., Exhibit K.

This study is the most comprehensive analysis to date of the potential costs required to meet new and emerging stormwater regulations in the Los Angeles area. It confirms that advanced treatment of storm flows will likely be required to meet current and anticipated federal and state water quality standards. Such treatment will be extremely costly and will generate significantly negative economic consequences for our region. The principal study case, which contemplates 65 treatment plants to accommodate regional stormwater requirements, shows that:

- The capital costs required to build new collection and treatment facilities range from $43.7 billion to treat flows from about 70% of the historic average annual storm events to $283.9 billion for 97% of the expected storm events.
- The net employment impacts depend on the period studied, a 15-year construction period, or a subsequent period of operations. In the first period, losses range from over 22,000 full-time jobs per year to treat 70% of the annual storm events to 139,000 full-time jobs per year to achieve 97% storm event coverage. The corresponding annual job losses for post-construction plant operations and maintenance range from 59,000 jobs to over 382,000.
- The present value (cost) of the net economic impacts from the project over 20 years ranges from $25 billion to treat storms that drop ½ inch per day or less (70% of storms or 22 days per year) to $156 billion for 97% coverage, or a six fold increase in costs to treat an average of nine additional days of runoff per year.

- Over 20 years, the present value (cost) of the net economic impacts to El Monte will range from $399 million to $2.56 billion, $492 million to $3.17 billion for Inglewood, $737 million to $4.66 billion for Pasadena, $321 million to $2.2 billion for Pomona, and $1.2 billion to $7.7 billion for Torrance.
- The 20 year present value (cost) of the net economic impacts to each L.A. County household for these required stormwater facilities ranges from about $6,670 to treat the smallest 70% of storms to $41,760 to treat 97% of the expected annual storm events.[30]

Clearly, the management strategy being taken by the agencies is likely to have a massive impact on the Southern California economy. In light of these projected costs, it seems unnecessary and unwise to prohibit regional stormwater management strategies like constructed wetlands which offer the benefits of high water quality and cost effectiveness.

C. Review of L.A. Regional Board's Basin Plan

Given the manner in which U.S. EPA and various state agencies interpret the phrase "navigable waters" under the CWA, CPR understands that, in the absence of legislative relief, the agencies' hands may remain somewhat tied. Thus, in addition to its legislative efforts at the federal level, CPR has attempted to address problems with the California water quality standards themselves. CPR believes that one of the major problems with the standards is that they are being applied in a manner which assigns beneficial uses, such as swimming, to storm drains and concrete culverts. Thus, CPR and others supported a study by Drs. Susan Paulsen and John List entitled, *A Review of the Los Angeles Basin Plan Administrative Process*, February 2003, attached hereto as Exhibit L.

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[30] *Id.*

Drs. Paulsen and List are nationally recognized water quality experts with many years of experience regarding water quality standards in the State of California. Their study concluded in part:

> The application of water quality objectives to all tributary streams via the tributary rule disregards the public interest. . . . Such an interpretation could require the collection and treatment of storm flows, urban runoff, and other nonpoint source sources on a very small, localized scale. This would result in impractical, costly and inefficient methods for improving water quality in the larger receiving water bodies that the Clean Water Act and the Porter-Cologne Act [are] primarily intended to protect. The tributary rule should be revised to reasonably protect designated beneficial uses without extending, at enormous potential expense, regulatory requirements to each and every upstream drainage facility within the Los Angeles Region. . . .[31]

V.

SPECIFIC CONCERNS

A. The Current Approach Severely Discourages The Use Of Constructed Wetlands

The current Southern California approach to stormwater regulation unnecessarily obstructs regional solutions such as constructed wetlands. This is because the agencies view such regional filtering facilities as part of the MS4 system which, in turn, is considered "navigable waters of the United States." Thus, project opponents are arguing that any stormwater discharges that flow *into* a constructed wetland are subject to strict water quality standards *before* they enter the constructed wetland, which if accepted renders the entire strategy behind constructed wetlands impractical, illegal and moot.

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[31] *Id.* at 56.

B. The Current Approach Is Inconsistent With The Plain Language Of The CWA

Section 402(p) of the CWA provides that "[P]ermits for discharges from municipal storm sewers . . . may be issued on a system- or jurisdiction-wide basis . . . shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers . . . and shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ."[32] Treating MS4s as "waters of the United States," through the Tributary Rule or otherwise, is clearly inconsistent with this language.

First, Section 402(p) provides for the permitting of stormwater discharges *from* MS4s, not stormwater discharges *into* MS4s.[33] If MS4s are treated as navigable waters of the United States, the permitting of stormwater discharges *into* MS4s would be mandatory under the CWA.[34] This approach would mandate that water quality-based and technology-based standards be applied at thousands of entry points into MS4s, a result clearly not intended by the authors of Section 402(p).

Similarly, if MS4s are treated as "navigable waters of the United States," it would be practically impossible to issue "jurisdiction-wide" permits for MS4s, as every entry point into the MS4 would be treated as an entry point into "navigable waters of the United States." Yet, Section 402(p) explicitly provides that MS4 permits may be issued on a "system- or jurisdiction-wide basis."[35]

Third, Section 402(p) contains a separate regulatory provision for *non-stormwater* discharges *into* MS4s.[36] Such *non-stormwater* discharges are to be "effectively prohibited."[37] It seems superfluous to set forth this separate regulatory requirement for *non-stormwater*

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[32] 33 U.S.C. § 1342(p)(3)(B).

[33] *Id.*

[34] 33 U.S.C. § 1311.

[35] 33 U.S.C. § 1342(p)(3)(B)(iii).

[36] *Id.* at § 1342(p)(3)(B)(ii).

[37] *Id.*

discharges *into* MS4s if *all stormwater* discharges are to be regulated prior to entering MS4s. When the provision regulating *non-stormwater* discharges *into* MS4s is compared with the provision regulating *stormwater* discharges *from* MS4s, the distinction in regulatory strategy is unambiguous – stormwater discharges are to be regulated on the way out of the MS4 system.

Finally, permits for discharges *from* MS4s must require controls to reduce the discharge of pollutants to the maximum extent practicable, or MEP.[38] Again, the separate standard for discharges *from* MS4s under Section 402(p) would be rendered meaningless if stormwater discharges *into* MS4s are to be regulated under the more stringent water quality- and technology-based standards under Section 301 of the CWA.[39]

C. The Current Approach Is Impractical

Another consequence of the current approach to treating MS4s as "navigable waters of the United States" is that the TMDL program must be applied directly to MS4s. For some of the same reasons that municipal stormwater permits should be enforced *after* stormwater discharges flow out of the MS4 systems, TMDLs should also be enforced at this latter discharge point. The enforcement of TMDLs and technology-based standards at thousands of discharge points within the MS4 system (a direct consequence of labeling MS4s as "navigable waters of the United States") is an impractical approach to stormwater regulation.

D. The Current Approach Is Inconsistent With Prior EPA Representations

Finding MS4s to be "navigable waters of the United States" is directly contrary to prior EPA representations. The following excerpt is from the 1990 preamble to EPA stormwater regulations:

> One municipality commented that neither the term "point source" nor "discharge" should be used in conjunction with industrial releases into urban stormwater systems because that gives the

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[38] *Id.* at § 1342(p)(3)(B)(iii).

[39] 33 U.S.C. at §§ 1311, 1342(p)(3)(B).

> impression that such systems are navigable waters. EPA disagrees that any confusion should result from the use of these terms in this context. In this rulemaking, EPA always addresses such discharges as "discharges through municipal separate storm sewer systems" as opposed to "discharges to waters of the United States."[40]

Thus, EPA made clear that stormwater runoff *into* MS4s (*i.e.*, roads, ditches, and storm drains, etc.) should not be treated as a discharge of pollutants into "navigable waters of the United States."

E. The Current Approach Improperly Encroaches On Local Land Use Planning Authority

The end result of the agencies' approach in applying the term "navigable waters of the United States" is to impermissibly invade local land use authority under the guise of CWA federal "mandates." However, the CWA explicitly reserves local land use authority for cities. Clean Water Act § 101(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. . . ."). The United States Supreme Court recently affirmed that the Clean Water Act was not intended to take local planning authority away from cities. *See Solid Waste Agency of Northern Cook County*, 531 U.S. at 174 (2001) (striking down authority to issue a NPDES permit for discharges to isolated waters in part on grounds it would "result in a significant impingement of the States' traditional and primary power over land and water use," *citing Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments")). The term "navigable waters of the United States" should be narrowed to be consistent with the CWA's express reservation of local land use authority.

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[40] 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990).

VI.
CONCLUSION

In summary, on behalf of CPR, I request that the definition of "navigable waters of the United States" under the CWA be amended to explicitly exclude MS4s, thus encouraging the use of regional stormwater management strategies such as constructed wetlands. Additionally, the process for designating beneficial uses for water bodies must be improved to remove the uncertainty under which use changes are acceptable to EPA and State officials. These guidelines should encourage states to revise uses, recognizing the appropriate distinctions for tributaries and other upsteam sources, in order to ensure more cost-effective and reasonable water quality control strategies.

Thank you for your attention to this important matter.

Non-Executed Original_____
Mr. Kenneth Farfsing
City Manager, City of Signal Hill
Senior Coordinator, Coalition for Practical Regulation[41]

[41] I have consulted with attorneys at Latham & Watkins LLP with respect to certain legal points made in this statement.